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UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02-31 OF 2009 (W)
RAUS SHARIF, ABDULL HAMID EMBONG AND HELILIAH FCJJ
6 SEPTEMBER 2010

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Civil Procedure — Appeal — Interference by appellate court — Trial court's decision and findings of facts overturned by Court of Appeal ('COA') — Trial court found material witness untruthful and gave its reasons for so holding — Whether COA wrong to disagree with trial judge and find witness to be credible without
D *giving any reason for doing so — Whether COA wrong to have relied on selective disputed documents to overturn trial judge's findings of facts which were supported by cogent reasons — Whether COA made consequential orders that were wrong and grossly against the weight of the evidence*

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The appellant ('UEM') entered into a joint-venture agreement with Genisys Integrated Engineers Pte Ltd ('GIE'). A company ('UEG') was formed to carry out the joint venture. UEM held 51% of the shares in UEG while GIE held the remaining 49%. UEG's day-to-day management was handled by a chief executive officer ('Seow') who was also the managing director and majority
F shareholder in GIE. Initially, the joint-venture prospered but within a few years, allegations of mismanagement and wanton and oppressive behaviour, particularly by Seow, caused the relationship between the two partners to irretrievably break down resulting in both parties filing separate petitions to wind up UEG. After a joint hearing of the respective petitions, the High Court
G dismissed GIE's petition holding that it had not proved that the affairs of UEG were being conducted, or that the powers of the directors were being used, in a manner oppressive to, or in disregard of the interests of, GIE. The court, however, allowed UEM's petition and ordered UEG to be wound up on finding that UEM had proven its case on balance of probabilities. As the trial judge
H found UEG to be insolvent, no order was made for UEM to buy out GIE's shares in UEG. On GIE's appeal against the trial court's decision, the Court of Appeal ('COA') upheld the dismissal of GIE's petition, dismissed UEM's petition, set aside the winding-up order, ordered the executive authority of UEG to be re-vested in the board of directors, restored Seow as CEO and fixed
I a date to hear arguments on the issue of consequential orders and costs. At that subsequent hearing, the COA, inter alia, ordered UEM to buy out GIE's entire shareholding in UEG and appointed a valuer to value UEG. UEG was valued at approximately RM81m. UEM was granted leave to appeal to the Federal Court against the COA's decision in setting aside its winding-up petition ('the

first appeal') and the decision ordering it to buy up GIE's shares in UEG ('the second appeal'). A

Held, allowing both the appeals, setting aside the COA's decisions in both cases and reinstating the orders made by the High Court in the first appeal: B

(1) This court was unable to say that the findings of facts by the trial judge on the alleged oppression of GIE were unsustainable and were plainly wrong. The trial judge had painstakingly identified and dealt with the issues exhaustively in each of the two petitions before him. His findings were supported by cogent reasons. There was no reason for the COA to reverse them (see para 39). C

(2) The trial judge had the audio-visual advantage over an appellate court in hearing the witness and observing his demeanour. Thus, a finding on a witness's credibility based on his demeanour was a personal opinion of the trial judge and it should not, ordinarily, be disturbed at the appellate stage. This was especially so in the instant case where the trial judge found Seow — the only witness put forth by GIE — to be not a witness of truth. The trial judge gave reasons for his findings. In the circumstances, the trial judge's reasons and findings were entitled to great respect (see para 40). D E

(3) In the instant case, as found by the trial judge, the case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute between the parties and the circumstances underlying material documentary evidence. In respect of the documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses. It was for this reason that the trial judge's conclusion that Seow (the only witness for GIE) was not a witness of truth was of great significance. GIE's case was mounted on the strength of Seow's evidence. Reliance was placed on Seow as to how documents were to be understood. Several affidavits were filed by Seow in the proceedings which were then relied upon in his evidence-in-chief for the trial of both the petitions. Thus, what the trial judge had to say about Seow as a witness was crucial (see paras 27–28). F G H

(4) The findings of credibility in this case could not be severed from the documentary evidence. The trial judge's finding that Seow was untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the evidence. The trial judge came to findings of specific facts pertaining to the heads of oppression in UEM's petition in rejecting the version put forth by Seow. On the other hand, the COA, without addressing the trial judge's conclusion that Seow was an untruthful witness nor finding that I

conclusion to be wrong, proceeded to reverse the trial judge's findings on the alleged oppression of GIE by referring only to specific documents, including documents that were disputed and challenged at the trial. The COA failed to recognise the significance of Seow's evidence in response to UEM's petition and erred in viewing the documents selectively. The COA indirectly reinstated Seow as a credible witness without giving any reason for doing so (see paras 30–32).

(5) The total effect of the consequential orders (which were such that they were not sought for) made by the COA was tantamount to unjust enrichment. This was because the COA, in giving effect to the buy-out order and by adopting the valuation of approximately RM81m for UEG, failed to consider Seow's own evidence (which the COA indirectly held to be credible) that UEG had no money left, no cash balance left in its bank account, no money to pay its creditors, salaries or utility bills, no projects work left to do and that it had only six employees remaining. Obviously, a buy-out of UEG's shares was not a viable option. UEG, as rightly found by the trial judge, was insolvent (see paras 44–45).

[Bahasa Malaysia summary

Perayu ('UEM') memasuki perjanjian usaha sama dengan dengan Genisys Integrated Engineers Pte Ltd ('GIE'). Syarikat ('UEG') dibentuk untuk menjalankan usaha sama. UEM memegang 51% daripada saham dalam UEG sementara GIE memegang selebihnya 49%. Pengurusan harian UEG diuruskan oleh ketua pegawai eksekutif ('Seow') yang juga adalah pengarah urusan dan pemegang saham majoriti dalam GIE. Pada mulanya, usaha sama adalah berjaya tetapi dalam masa beberapa tahun, dakwaan salah pengurusan dan kelakuan sewenang-wenangnya dan menindas, terutamanya oleh Seow, menyebabkan hubungan di antara kedua-dua rakan kongsi retak mengakibatkan kedua-dua pihak memfailkan petisyen berasingan untuk menggulung UEG. Selepas pendengaran bersama terhadap petisyen masing-masing, Mahkamah Tinggi menolak petisyen GIE dengan memutuskan bahawa ia tidak membuktikan bahawa hal ehwal UEG dijalankan, atau kuasa pengarah-pengarah digunakan, dalam cara menindas kepada, atau tidak memperdulikan kepentingan, GIE. Mahkamah, walau bagaimanapun, membenarkan petisyen UEM dan memerintahkan UEG digulung atas dapatan yang UEM telah membuktikan kesnya atas imbangan kebarangkalian. Memandangkan hakim perbicaraan mendapati UEG akan menjadi solven, tiada perintah dibuat untuk UEM membeli saham GIE dalam UEG. Atas rayuan GIE terhadap keputusan mahkamah perbicaraan, Mahkamah Rayuan ('MR') mengesahkan penolakan petisyen GIE, menolak petisyen UEM, mengenepikan perintah penggulungan, memerintahkan kuasa eksekutif UEG diletakkan semula dalam lembaga pengarah, mengembalikan Seow sebagai KPE dan menetapkan tarikh untuk mendengar hujahan atas isu perintah dan kos berbangkit. Pada pendengaran kemudiannya, MR, antara

lain, memerintah UEM untuk membeli keseluruhan pegangan saham GIE dalam UEG dan melantik penilai untuk menilai UEG. UEG adalah dinilaikan pada kira-kira RM81 juta. UEM diberikan izin untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR dalam mengenepikan petisyen penggulungannya ('rayuan pertama') dan keputusan memerintahnya untuk membeli saham-saham GIE dalam UEG ('rayuan kedua').

Diputuskan, membenarkan kedua-dua rayuan, mengenepikan keputusan MR dalam kedua-dua kes dan mengembalikan semula perintah-perintah yang dibuat oleh Mahkamah Tinggi dalam rayuan pertama:

(1) Mahkamah ini tidak dapat menyatakan bahawa dapatan-dapatan fakta oleh hakim perbicaraan atas dakwaan penindasan GIE tidak dapat dipertahankan dan jelas salah. Hakim perbicaraan telah mengenal pasti dengan bersungguh-sungguh dan menangani isu-isu dengan terperinci dalam kedua-dua petisyen di hadapan beliau. Dapatannya adalah disokong dengan alasan yang meyakinkan. Tidak terdapat alasan untuk MR mengakasnya (lihat perenggan 39).

(2) Hakim perbicaraan telah mendapat kelebihan audio-visual daripada mahkamah rayuan dalam mendengar saksi dan memerhati kelakuannya. Oleh itu, dapatan atas kebolehpercayaan saksi berdasarkan kelakuannya adalah pandangan peribadi hakim perbicaraan dan ia tidak patut, secara biasa, diganggu pada peringkat rayuan. Ini adalah terutamanya dalam kes ini di mana hakim perbicaraan mendapati Seow — satu-satunya saksi yang dikemukakan oleh GIE — untuk tidak menjadi saksi yang benar. Hakim perbicaraan memberi alasan-alasan untuk dapatannya. Dalam keadaan, alasan-alasan dan dapatan-dapatan hakim perbicaraan berhak untuk dihormati (lihat perenggan 40).

(3) Dalam kes ini, seperti yang didapati oleh hakim perbicaraan, kes UEM dan GIE bukan satu yang berdasarkan hanya atas keterangan dokumentar. Kedudukan pihak masing-masing adalah bergantung sepenuhnya ke atas keterangan lisan terhadap keadaan pertikaian di antara pihak-pihak dan keadaan yang mendasari keterangan dokumentar material. Berkaitan keterangan dokumentar, ia bukan keseluruhannya boleh difahami tanpa faedah penjelasan oleh saksi-saksi material. Adalah untuk sebab ini kesimpulan hakim perbicaraan bahawa Seow (satu-satunya saksi untuk GIE) bukan saksi yang benar adalah sangat penting. Kes GIE adalah didasarkan atas kekuatan keterangan Seow. Pergantungan diletakkan ke atas Seow bagaimana dokumen-dokumen dapat difahami. Beberapa afidavit difailkan oleh Seow dalam prosiding yang mana kemudiannya diguna dalam keterangan utamanya untuk perbicaraan kedua-dua petisyen. Oleh itu, apa yang hendak dikatakan oleh hakim perbicaraan mengenai Seow sebagai saksi adalah penting (lihat perenggan 27–28).

(4) Dapatan kredibiliti dalam kes ini tidak boleh diputuskan daripada keterangan dokumentar. Dapatan hakim perbicaraan yang Seow tidak benar adalah bahagian integral keseluruhan kes atas dasar penghargaan kehakiman terhadap keterangan yang munasabah dan betul. Hakim perbicaraan mencapai dapatan fakta spesifik berkaitan kepala penindasan dalam petisyen UEM dalam menolak versi yang dikemukakan oleh Seow. Sebaliknya, MR, tanpa menangani kesimpulan hakim perbicaraan yang Seow adalah saksi yang tidak benar ataupun dapatan bahawa kesimpulan adalah salah, meneruskan untuk mengakas dapatan hakim perbicaraan atas dakwaan penindasan GIE dengan merujuk hanya kepada dokumen-dokumen spesifik, termasuk dokumen-dokumen yang dipertikaikan dan dicabar semasa perbicaraan. MR gagal untuk menerima pentingnya keterangan Seow dalam menjawab kepada petisyen UEM dan tersilap dalam menyemak dokumen secara berpilih. MR secara tidak langsung mengembalikan semula Seow sebagai saksi yang boleh dipercayai tanpa memberi apa-apa sebab untuk berbuat sedemikian (lihat perenggan 30–32).

(5) Kesan keseluruhan perintah-perintah berbangkit (yang mana ia tidak dipohon) yang dibuat oleh MR adalah merupakan kepada pengkayaan yang tak adil. Ini adalah kerana MR, dalam memberi kesan kepada perintah membeli dan dengan mengguna penilaian kira-kira RM81 juta untuk UEG, gagal untuk mempertimbangkan keterangan Seow sendiri (yang mana MR secara tidak langsung memutuskan sebagai boleh dipercayai) bahawa UEG tidak mempunyai wang, tiada baki tunai dalam akaun banknya, tiada wang untuk membayar pemiutang-pemiutangnya, gaji atau bil kemudahan awam, tiada projek untuk dibuat dan bahawa ia hanya mempunyai enam pekerja yang tinggal. Jelas, pembelian saham-saham UEG bukan pilihan yang baik. UEG, seperti yang didapati oleh hakim perbicaraan dengan betul, adalah bankrap (lihat perenggan 44–45).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1420–1465.

Cases referred to

Allied Bank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1; [1998] 2 CLJ 33, HC (refd)

Chong Khee Sang v Phang Ah Chee [1984] 1 MLJ 377; [1983] 1 LNS 57 (refd)

Ooi Yoke In & Anor v Public Finance Bhd [1992] MLJU 25; [1993] 2 CLJ 464, HC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b, PC (refd)

Watt or Thomas v Thomas [1947] AC 484, HL (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Legislation referred to

Companies Act 1965 ss 131, 181
Evidence Act 1950 s 73A

Appeal from: Appeal No W-02–1157 of 2005 (Court of Appeal, Putrajaya)

Dominic Putchucheary (Firoz Hussein, Malik Imtiaz Sarwar & Cheng Mai with him); (Putchucheary Firoz & Mai) for the appellant.
Gideon Tan (Cherrien Chan & Lee Wan Ning with him); (Gideon Tan Razali & Zaini) for the respondent.

Raus Sharif FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us: Rayuan No 2–31 of 2009 ('first appeal') and Rayuan No 02–32 of 2009 ('second appeal'). Both appeals are by UEM Group Bhd (formerly known as United Engineers (M) Bhd).

[2] The first appeal was directed against the decision of the Court of Appeal on 14 July 2008. The Court of Appeal had reversed the decision of the High Court in granting a winding up petition by United Engineers (M) Bhd ('UEM') against UEM Genisys Sdn Bhd ('UEG'). The High Court had earlier found that the affairs of UEG were being conducted by Genisys Integrated Engineers Pte Ltd ('GIE') in a manner contrary to s 181 of the Companies Act 1965 ('the Act').

[3] The second appeal was directed against the decision of the Court of Appeal on the consequential orders made on 7 November 2008. What had happened was this. The Court of Appeal after reversing the decision of the High Court in winding up UEG went a step further by inviting the parties to make further submissions on the issue of costs and consequential orders. After hearing the parties, the Court of Appeal, inter alia, ordered UEM to buy-out GIE's 49% shares in UEG. The Court of Appeal also made some other consequential orders to give effect to the buy-out order. Hence, the second appeal by UEM.

BACKGROUND FACTS

[4] The facts and events leading to these two appeals are these. On 2 November 1993, UEM and GIE entered into a joint venture agreement ('shareholders agreement') for both these companies to jointly venture into and

exploit the mechanical and electrical engineering market in Malaysia. A private limited company called UEG was incorporated as the vehicle to carry out the joint venture. Under the shareholders agreement, UEM held 51% of the shares in the UEG and GIE held the remaining 49%.

[5] The shareholders agreement defined the roles of UEM and GIE in the joint venture. It also made it clear that the management and control of UEG was to be vested in its Board of Directors. However, the day to day management of its business and affairs were delegated to Chief Executive Officer (CEO), Seow Boon Cheng ('Seow'). Seow was also the managing director and majority shareholder of GIE.

[6] The venture between UEM and GIE started very well. Considerable amount of contract works was awarded by UEM and its related companies to UEG. However, in 1997, UEM decided to dispose of its non-core business. UEG was considered to be its non- core business and accordingly it set about identifying a buyer to dispose of its shares in UEG. UEM then entered into a sale and purchase agreement to sell its 51% shareholding in UEG to Nova Nusantara for RM1.02m with an added sweetener that 'listing of UEG is to be attempted within three years of the takeover'.

[7] When GIE learned about the deal between UEM and Nova Nusantara, it wrote to UEM reminding UEM about cl 12.3 of their shareholders agreement. Under cl 1 2 of the shareholders agreement, a member intending to transfer its shares, should offer them to the existing members. It means UEM should have first offered its shares in UEG to GIE. In the same letter, GIE expressed its willingness to purchase from UEM its UEG shares on the same terms as those proposed by Nova Nusantara with one difference, that was, that the duty on GIE to take steps to have UEG listed would expire at the end of the three years after the sale or if the attempt at listing failed.

[8] In response UEM offered to sell its UEG shares to GIE in the sum of RM10.71m and the purchase price was to be paid in full upon signing of the sale and purchase agreement. Thereafter, for a period of two years there were long and protracted negotiations between UEM and GIE about the sale of the shares. It was during these periods that the worms in UEG started to crawl in the open. UEM, who had placed Seow in great trust to manage UEG with minimum interference found Seow to be untrustworthy. What followed was a total breakdown of relationship between UEM and GIE. As a result, litigations were commenced with each party presenting its petition under s 181 of the Act and each contending that the other had acted oppressively.

[9] UEM petition was registered as Kuala Lumpur High Court Suit No D3–26–29 of 2001 while GIE petition was registered under Kuala Lumpur High Court Suit No D9–26–43 of 2000.

[10] In UEM petition, the complaint by UEM was that Seow conducted the affairs of UEG with a lack of probity and oppressed UEM as a shareholder. UEM submitted that Seow had performed acts without proper board authorisation and kept UEM in the dark about certain transactions and payments. The transactions complained of were the 'Hanoi Sheraton Project', which was a subcontract awarded to UEG, from which payments to be received by UEG were allegedly diverted by Seow to GIE; the transfer of RM1m from UEG's account at Mayban Finance Bhd to GIE's bank account at Maybank Bhd by Seow and GIE; the payment of RM50,000 to an ex-employee of UEG by Seow which showed how the funds of UEG were misappropriated or misused by those having control of UEG; payment by Seow to a company called Metronic Engineering Sdn Bhd ('Metronic'), in which he held 62% of the shares, without declaring his interest in Metronic to UEG's board; inter-company payments instituted by Seow which were designed to circumvent the system of joint approval of payments which was in place in UEG; and finally the fact that the management of UEG was lacking in probity because UEG's account for the year ending 31 December 1998 had not been audited and because UEM was denied access to UEG's accounting documents. Accordingly, UEM sought that UEG be wound up or alternatively the GIE's shares in UEG be sold to UEM.

[11] In GIE petition, the complaint by GIE was based on those matters that transpired after UEM's decision to withdraw from the joint venture. The main grounds of complaint were first, that UEM acted in breach of the shareholders agreement by dealing with Nova Nusantara and second, that UEM starved UEG of funds so as to eventually have it wound up. GIE also submitted that Seow did the acts complained of to keep UEG alive and UEM had acquiesced to those transactions that it now complained about. Therefore, GIE, inter alia, sought for an order that it be allowed to purchase all shares in UEG held by UEM at net tangible asset valued at 31 December 1999.

[12] The two petitions were consolidated and heard together. On 20 October 2008, the learned High Court judge (trial judge) dismissed GIE's petition with costs. The trial judge held there were no instances mentioned by GIE in its petition that the affairs of UEG were being conducted or that the powers of the directors were being used in a manner oppressive to GIE or in disregard of the interest of GIE, that would require the remedy under s 181 of the Act.

[13] However, in UEM petition, the trial judge found that the factual assertions as pleaded by UEM in its petition have been proven on the balance of probabilities. He found that all the complaints raised by UEM, taken jointly and severally, clearly indicate that the affairs of UEG were conducted in a manner which was oppressive to UEM and wholly disregarded its interest as a shareholder of UEG. He concluded that it was gravely oppressive to allow the continuance of UEG as a joint venture where:

(a) US$13,859,484.10 or RM52,666,040 due to UEG had been diverted to GIE in Singapore;

(b) RM1m had been wrongly siphoned off to GIE in Singapore and had been spent;

(c) moneys in UEG were used for GIE's purposes;

(d) GIE nominated directors made secret profits and this is a breach of fiduciary duties they owed to UEG and breach of s 131 of the Act;

(e) no audited accounts of UEG have been filed for more than six years and the auditors had confirmed that they were still unable to finalise the audited accounts for the financial year ending 31 December 1999;

(f) the financial position of UEG was unknown;

(g) Seow used the staff of UEG for GIE projects without compensating UEG;

(h) Seow managed UEG unilaterally without reference to the Board of Directors when by operation of article 72(h), he clearly was no longer even a director of UEG;

(i) UEM was denied the right to appoint directors of its choice;

(j) UEM was prevented by Seow from replacing Azni Amran as its signatory to UEG accounts despite the fact that Azni Amran no longer represented UEG and had confessed to committing a criminal breach of trust in respect of RM375,000 belonging to UEG;

(k) the directors nominated by UEM were denied access to UEG's offices, records and document of UEG and were thereby prevented from discharging their duties as directors;

(l) the Board of Director of UEG was deadlock and unable to function; and

(m) UEG operated in breach of the conditions imposed by Foreign Investment Committee (FIC); and

(n) staff of UEG incited against the directors of UEG nominated by UEM.

[14] The trial judge also found that UEG was gravely insolvent. Thus, he was of the view that a buy-out of GIE's shares in UEG was not a viable option. He

accordingly made the order for UEG to be wound-up. A liquidator was appointed to manage the affairs of UEG.

[15] Aggrieved, GIE appealed against the decision of the High Court. On 14 July 2008, the Court of Appeal dismissed GIE's appeal against the decision of the High Court in dismissing GIE petition. The Court of Appeal agreed with the High Court that the acts complaint of against UEM as stated in GIE petition does not constitute oppression that would grant relief under s 181 of the Act.

[16] However, the Court of Appeal allowed GIE's appeal against the UEM petition. UEM petition was dismissed. The orders of the High Court were set-aside. In doing so, the Court of Appeal overturned almost all findings of the trial judge. The Court of Appeal, inter alia, held the following:

(a) the trial judge had failed to properly evaluate the facts presented to him as a part of a consequential story when deciding whether there was oppression in the particular circumstances of this case;

(b) the documentary evidence showed that UEG's board knew all about the subcontract and the payment that were to be made to GIE in respect of the Hanoi Sheraton Project. These expose UEM's allegations to be completely lacking in substance;

(c) there was absolutely no basis for the learned trial judge to come to the conclusion that RM1 million was misappropriated from UEG's account by Seow and GIE. The trial judge's analysis of the evidence was confined to only certain portion of Seow's evidence without considering the other evidence that overwhelmingly pointed to Seow's innocence;

(d) the trial judge's finding that a cheque for RM50,000, which was made out to an ex-employee of UEG, on the instruction of Seow as being another instance of how fund of UEG were misappropriated or misused by those having control of UEG was a serious misdirection on facts. That was because independent contemporaneous documentary evidence showed that the money never left UEG;

(e) the learned trial judge further misdirected himself on the facts and the law when evaluating the facts and evidence. Although Seow testified that he had disclosed his interest in Metronic to UEM nominated directors of UEG, the said directors were not called as witnesses to clarify the position. It was a serious miscarriage of justice to put to a witness that he or she did not disclose material facts to named persons and then omit to call these persons with no offer of an explanation for the omission;

(f) the learned trial judge appeared to have completely overlooked UEM's own participation in the intercompany transactions. This duality of

approach to the evaluation of evidence constituted a serious misdirection resulting in a miscarriage of justice, which warranted appellate interference;

(g) an objective viewing of the accounts showed that UEG was in a financially straitened position principally because of monies owed to it by UEM's subsidiaries and its group of companies. Thus, the finding that Seow conducted the management of UEG's financial affairs in a manner wholly lacking probity could not stand in the light of independent contemporaneous documentary evidence and was against the probabilities of the case; and

(h) taking into account the whole of the evidence, including the undisputed contemporaneous documents, none of the grounds of complaint raised by UEM and dealt with by the High Court were substantiated.

[17] After setting aside the winding-up order, the Court of Appeal ordered that the executive authority of UEG was to be re-vested to its board and Seow was restored to his position as the CEO of UEG. The Court of Appeal did not stop there. It fixed the matter for further submissions on the issue of consequential orders and costs.

[18] On 7 November 2008, the Court of Appeal, after hearing the parties made the following orders:

(a) UEM to buy out GIE 49% of shares in UEG;

(b) a valuer to be appointed to value UEG, based on net tangible assets as at 1998 but to take into account, inter alia, debts owned by UEM to UEG after 31 December 1998;

(c) UEM to pay interest on the purchase price at the rate of 8% per annum from 13 April 2001;

(d) UEM to pay for all valuation costs;

(e) UEM to pay GIE's costs on a common fund basis; and

(f) UEM not entitled to costs for GIE's petition.

[19] Pursuant to the Court of Appeal's order of 7 November 2008, the valuer proceeded to value UEG. The valuer requested representation from UEM on the valuation of UEG. However, UEM did not provide any representations. Thereafter, the valuer sought an extension of time from the Court of Appeal to file its affidavit of valuation. The matter was fixed on 9 April 2009.

[20] On 9 April 2009, the Court of Appeal granted the extension of time and proceed to adopt the affidavit of valuation of the valuer which valued UEG at approximately RM81m. The Court of Appeal further ordered that the buy-out be completed by 30 May 2009.

LEAVE TO APPEAL TO THE FEDERAL COURT

[21] Consequently, UEM applied for leave to appeal to this court against the decisions of the Court of Appeal of 14 July 2008, 7 November 2008 and 9 April 2009. On 23 June 2009, this court granted leave to appeal against the decisions of the Court of Appeal dated 14 July 2008 ('first appeal') and 7 November 2008 ('second appeal').

[22] In respect of the first appeal the following questions were posed:

Question 1: In view of the deliberate refusal by the trial judge to accept the evidence of a material witness as truthful, whether the Court of Appeal was entitled to reject the said finding on inferences from documents?

Question 2: Whether the Court of Appeal can draw inferences on documents, the authenticity of which were challenged at trial and which were not proven by the makers of the said documents.

Question 3: Whether a finding of fact by the Court of Appeal on material issue without any evidential foundation occasions a miscarriage of justice?

Question 4: Whether a Shareholders' Agreement which has not been ratified by the company and which has not been incorporated into the Articles of Association of the company creates rights in favour of a member which are material for the purposes of determining a petition for oppression pursuant to s 181 of the Companies Act 1965.

Question 5: Whether the relationship between two corporate shareholders dealing at arm's length in a joint venture company is one of *uberrima fides* or utmost good faith?

Question 6: Whether decisions made on an informal basis, which in effect, circumvent the formal requirements of holding a board meeting and passing resolutions as required by its articles of association of a company are valid and binding.

Question 7: Whether an alleged informal disclosure of interest in a contract constitutes a declaration as per s 131 of the Companies Act 1965?

[23] In respect of the second appeal, the following questions were posed:

Question 1: Whether section 69(4) of the Court of Judicature Act 1964 vests the Court of Appeal with the jurisdiction and/or power to grant on appeal, any of the remedies provided under section 181(2) of the Companies Act notwithstanding the grounds set out under section 181(1) not being established by the party seeking remedy.

Question 2: Whether the Court of Appeal has powers to order the Appellant to purchase the shares of the 1st Respondent in the 2nd Respondent when it had determined that there is no oppression as provided under section 181(1) of the Companies Act 1965?

Question 3: Whether a Court can order a party to pay costs on a common fund basis when such costs were never prayed for or claimed by the party awarded costs and where neither party was given the opportunity to submit on the matter?

Question 4: Whether a Court has jurisdiction and power to make ancillary orders that a Petitioner pay interest on the yet to be determined purchase price of the Respondent's shares in the company, calculated from the date of presentation of the Petitioner's Petition?

THE FIRST APPEAL

[24] We are of the view, although seven questions were posed before us, the crucial questions in the first appeal are Questions 1 to 3. We will begin by restating Questions 1 to 3 posed for determination by this court ie:

Question 1: In view of the deliberate refusal by the learned trial judge to accept the evidence of a material witness as truthful, whether the Court of Appeal was entitled to reject the said finding on inferences from documents?

Question 2: Whether the Court of Appeal can draw inferences on documents, the authenticity of which were challenged at trial and which were not proven by the makers of the said documents?

Question 3: Whether a finding of fact by the Court of Appeal on material issue without any evidential foundation occasions a miscarriage of justice?

[25] Encik Malik Imtiaz, who submitted on Questions 1 to 3 on behalf of UEM, contended that the Court of Appeal had materially erred in the way it approached the appeal and its powers to intervene with the findings of facts of the trial judge. Encik Gideon Tan, learned counsel for GIE contended otherwise. He submitted that the Court of Appeal was right in overturning the decision of the trial judge as the decision was plainly wrong.

[26] Thus, the prime issue in respect of Questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient j udicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; *Watt or Thomas v Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1).

[27] In the instant case, as found by the trial judge, that the case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute between the parties as well as the circumstances underlying material documentary evidence. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses.

[28] It is for this reason that the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This is because GIE's case was mounted on the strength of Seow's evidence. Reliance was placed on Seow as to how documents were to be understood. Several affidavits were filed by Seow in the proceedings which were then relied upon on Seow's evidence in chief for the trial of both the petitions. Thus, what the trial judge had to say of Seow as a witness is crucial. This was what the trial judge said:

> Seow's evidence in court throughout the proceedings should be treated with great caution. He was not a straight-forward witness. He has evaded answers in cross-examination when he considered true answers would be damaging to his case. His demeanour during cross-examination instil doubt on the truthfulness of his statements. His countless effort in evading questions put forth by UEM's counsel and the reluctance in his answer is in stark contrast to his solid and meticulous answers when questioned by GIE's Solicitors. The court finds that the weight attached to his statements would be considerably low taking into account his bad demeanour.
>
> Seow was evasive in his answers during cross-examination. He contradicted himself numerous times that, his credibility as a witness has been totally diminished (see Seow's evidence on 15 March 2004 at p 27–29 of the Notes of Proceedings). Other examples of his inconsistencies in his evidence are related below.
>
> In giving evidence before this court, Seow disagreed that he was the director of UEG who had primary responsibility for the financial affairs of UEG (see Notes of Proceedings dated 17 March 2004 at p 30). However, he had previously sworn a Statutory Declaration on 15 March 1998 (encl 11 at p 197) that he was the director of UEG who was primarily responsible for the financial management of UEG.
>
> In another occasion, Seow testified in Court that he instructed Messrs. Gidoen Tan Razali Zaini to act for UEG in respect of the D3 Petition in his capacity as a director of UEG together with Christina Rani and not under the DAL (see Notes of Proceedings dated 23 July 2002 at page 18). However, Seow had also affirmed in the proceedings affidavit no. 10, Enclosure 56 where he stated under oath that he had appointed Messrs. Gideon Tan Razali Zaini in his capacity as Chief Executive Officer of UEG and relying on the DAL. When this contradiction was pointed out to him, he testified:
>
> > I agree the version I gave in Court is true ... I agree I contradicted myself in my affidavit ... when I said that I appointed Gideon Tan in capacity as Chief Executive Officer and relying on the DAL ...

Obviously, Seow was lying and had forgotten what he had affirmed in his affidavit previously.

Another instance of inconsistency, is about the condominiums which Seow unilaterally accepted as a settlement of a debt due to UEG. In his evidence recorded on 24 July 2002 (at p 22) Seow initially stated that:

> I cannot recall why I accepted this payment in kind.

However, minutes later, he explained the reason to accept the payment in kind as follows:

> At the material times, Sungei Way Construction was renowned to be in dire financial straits and had not paid the amount owing to UEG for a long time. I would be failing my duty as Chief Executive Officer not to accept payment in kind.
>
> (see notes of proceedings dated 24 July 2002 at p 25)

Another example of Seow's untruthfulness is when he confirmed that as a matter of fact that at the end of each financial year there was contra process whereby the 'inter-company' accounts would be resolved (see Notes of Proceedings dated 17 March 2004 at p 66). However, subsequently Seow admitted that he did not know for a fact that there was contra-process at the end of each year (see notes of oroceedings dated 17 March 2004 at p 68). This was extremely significant because Seow was seeking to persuade this court that the 'inter-company' account was reconciled annually but the truth of it was that it had not been reconciled since 1995 as there were items in exh P25 which were unreconciled since then.

On these issues of demeanour and inconsistency, the court relies on *Sarkar's Law of Evidence*, 15 Edition, Vol 1, Wadha and Company Nagpur 1999:

> The demeanour and bearing of a witness should be very closely observed. Unless a witness is a skill actor, his demeanour frequently furnishes a clue to the weight of his testimony. It is because the trial judge had the advantage of seeing the witness that it has been repeatedly held that his decision on question of fact should not be lightly disturbed ... When the question of credibility depends on the demeanour in the box, the manner in which the witness answer and by how he seems to be affected by the question put and so on, the trial judge has an advantage.

In the present case, the demeanour of Seow when he gave evidence was to say the least, at its lowest ebb. There were pauses, cynical smiles, confusion and inconsistencies, all added into one. The credibility of Seow as the only witness for GIE is badly and adversely affected on the balance of probabilities. Seow's evidence is bristled with inconsistencies and half truth.

[29] It can be seen from the above that the trial judge's conclusion as to Seow's credibility was based on his observation not only on material attributes of Seow's demeanour but also on evident contradictions and inconsistencies on the relevant and material matters. The trial judge referred to specific examples of Seow's contradictions and inconsistencies. These examples were drawn from

the different aspect of the case before him and threaded through the various heads of oppression identified by UEM in its case. To that end, the trial judge noted that Seow had lied on affidavit as well as during his oral evidence and was untruthful.

[30] In the light of the above, it is apparent that this is a case where the findings of credibility could not be severed from documentary evidence. The finding by the trial judge that Seow was being untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the evidence. This is evident from a reading of the trial judge's judgment as a whole as well as his summary and conclusions. The trial judge had come to findings of specific facts, pertaining to the heads of oppression in the UEM's petition in rejecting the version put forth by Seow.

[31] The Court of Appeal, on the other hand despite not having addressed the trial judge's conclusion that Seow was not a witness of truth nor itself finding that the trial judge's conclusion in that regard was erroneous, proceeded to reverse the findings of the trial judge on the alleged oppression of GIE by referring only to specific documents. This was where the Court of Appeal had gone wrong. It had failed to recognise the significance of Seow's evidence to its case in response to UEM petition. It had also fallen into error in viewing the documents selectively and had in fact indirectly reinstated Seow as a credible witness, without assigning any reason for doing so.

[32] The disturbing feature of the judgment of the Court of Appeal is that, it had relied on some disputed documents, which had been challenged at the trial, as the basis of reversing the findings of facts of the trial judge. Two clear examples are the subcontract of the Sheraton-Hanoi Project and the alleged fax from GIE's accountant.

[33] With regard to the subcontract of the Sheraton-Hanoi Project, the Court of Appeal relied on its content extensively when reversing the finding of the trial judge that US$13,859,484.10 or RM52,666,040 due to UEG had having surreptitiously diverted by Seow to his own company in Singapore GIE. The judgment of the Court of Appeal on this issue reads:

> Last, but not least, you have the subcontract itself. Clauses 10(A) and (B) of that document are self explanatory. This is what they say:
>
> > (A) In consideration of the services to be rendered by GIE under this Agreement, GIE shall be paid a sub-contract sum (the 'Sub-Contract Sum') equivalent to the contract sum (before deduction of 2% of profit tax which will be levied by authority in Vietnam and to be paid by GIE) payable by the Main Contractor to UEG under the M & E Contract (the 'M & E Contract Sum') less UEG's procurement fee of three per cent (3%) of the M & E Contract Sum (the 'Procurement Fees') in accordance with sub Clause (B) below. There shall be no

> variation of the Sub Contract Sum save as a result of any variation in the M & E Contract Sum or the Works to be performed by GIE in accordance with Clause 13.
>
> (B) Without prejudice to UEG's primary obligation to make payment of the Sub-Contract Sum to GIE, UEG shall procure and ensure that the Main Contractor pays the M & E Contract Sum direct to GIE in accordance with the payment terms under the M & E Contract. GIE shall within a period of fourteen (14) days after receipt of the M & E Contract Sum from the Main Contractor pay to UEG the Procurement Fee by way of a telex transfer made out in favour of UEG.

Now, the learned judge did not make a finding that this document was false or unreliable. In fact he makes no reference at all to it in his judgment.

It follows that the following finding of the learned judge:

> It is clear from the above that the board of directors of UEG were at all material times unaware that the US$13,859,484.10, which was due to UEG in respect of the Hanoi Sheraton Project, had been surreptitiously diverted by Seow to his own company in Singapore GIE.
>
> flies in the teeth of contemporaneous evidence going the other way. There is therefore merit in GIE's complaint that there was no judicial appreciation of the evidence on this point. Based on the authorities already cited, the learned judge's conclusion on this part of the case cannot stand.

[34] With utmost respect, we believe that the reason why the trial judge did not make any reference to the subcontract in his judgment is because the authenticity of the subcontract was challenged by UEM. At the trial, the subcontract was marked only as an 'ID' as its maker was never called. Thus, how could the Court of Appeal accept and rely upon a document in toto without even considering the issue of its authenticity, when its authenticity had been expressly challenged in the High Court as well as in Court of Appeal. In the High Court, it was expressly pointed out that the purported subcontract between UEG and GIE was undated and signed only by one party. In the notes of proceedings of the High Court trial on 8 March 2005, UEM had challenged the authenticity of the subcontract (p 12506 Vol B29 of the appeal record). Further, in the notes of proceedings of the High Court on 9 March 2005, Seow was cross-examined on the issue of the alleged subcontract and its purported authenticity and signatory (p 12671 Vol B29 of the appeal record). Cik Sulaihah Maimunni's affidavit filed in the High Court in support of UEM petition affirmed on 8 May 2001, had challenged the authenticity of the subcontract. Again, in the Court of Appeal, UEM in its submission expressly challenged the authenticity and the failure of GIE to produce the maker and/or signatory of the alleged subcontract. Thus, reliance on the subcontract by the Court of Appeal was a clear error on evidential issue.

[35] Another example where the Court of Appeal relied on a disputed document was in relation to an alleged fax sent by GIE to UEM in relation to RM1m transferred by Seow from UEG account to GIE's bank. The fax reads as follows:

> Further to our teleconversation, this is to confirm that Genisys will be holding on behalf of UEG, in trust, the amount of RM1,000,000.00 remitted to our Maybank KL account on 28/8/00.

Based on the above, the Court of Appeal held that there was absolutely no basis on which the trial judge could have come to the conclusion that RM1m had been misappropriated by Seow. But, the Court of Appeal failed to recognise or consider the fact that the fax was challenged by UEM at trial. The Court of Appeal also failed to consider the evidence at the trial that the fax was never received and the fax log book evidence tendered by UEM showed that such fax was never received. In fact, the alleged fax was never marked as an exhibit at the trial as objection was raised by UEM as to its authenticity.

[36] It is fundamental that it is the requirement of the best evidence rule that the maker of a document must be called to prove it (*Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33). Further s 73A of the Evidence Act 1950 states that in civil proceedings, the maker must be called as a witness in order to render it admissible in evidence (*Ooi Yoke In & Anor v Public Finance Bhd* [1992] MLJU 25; [1993] 2 CLJ 464). And a document cannot be admitted into evidence and marked as such until properly proven (*Chong Khee Sang v Phang Ah Chee* [1984] 1 MLJ 377; [1983] 1 LNS 57). In the instant case, it is clear that both the subcontract and the fax were not properly proven and should have been disregarded. Thus, the Court of Appeal, by relying on those documents in reversing the findings of facts of the trial judge was clearly in error on evidential issues.

[37] Another error by the Court of Appeal was its finding that the RM50,000 was never misappropriated from UEG's fund, and thus reversing the finding of fact of the trial judge. The Court of Appeal ruled:

> What happened was this. A cheque for RM50,000 was made out to Elton Sun but cashed by UEG. The money was never paid out to Elton Sun. Instead, the cash was placed in UEG's safe. The police officer who investigated the report lodged by Sulaihah Maimunni confirmed that the money was indeed in UEG's safe. The evidence was never challenged by UEM. In the fact of the irrefragable evidence to the contrary it was a serious misdirection on the facts by the learned judge to hold as he did on this issue.

[38] We find that the above finding of the Court of Appeal was without any evidential foundation. This is because no police officer ever gave any such evidence in the High Court. No such evidence was ever before the trial judge. No doubt GIE had, by way of affidavit, exhibited purported notes of

proceeding of the sessions court criminal trial of Seow, but as it was a criminal proceedings, UEM was not a party to those proceedings and it was not possible for UEM to challenge the evidence. GIE did not subpoena the police officer for the purpose of these petitions, and therefore, UEM never had the opportunity to challenge the same or cross-examine the police officer. Thus, the conclusion by the Court of Appeal that RM50,000 was never misappropriated from UEG's fund, contrary to what the trial judge had found cannot stand.

[39] In the final analysis we are unable to say that the findings of facts by the trial judge on the alleged oppression of GIE were unsustainable and were plainly wrong. The trial judge had painstakingly identified and dealt with the issues exhaustively in each of the two petitions before him. We find that his findings are supported by cogent reasons. Thus, we see no reason why the Court of Appeal should reverse them.

[40] Speaking on appellate intervention, we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, a finding on a witness's credibility based on his demeanour is a personal opinion of a trial judge who had the audio-visual advantage of the performance of witnesses. It should not, ordinarily be disturbed at the appellate stage. This is especially so in the instant case where the trial judge had found that Seow, the only witness put forth by GIE, was not a witness of truth. The trial judge had given reasons as to why he found that 'Seow's evidence is bristled with inconsistencies and half truth'. We think in the circumstances of the reasons given by the trial judge, the findings are entitled to great respect.

[41] Accordingly, our answers to Questions 1 and 2 are in the negative. While our answer to Question 3 is in the positive. In the light of our findings to Questions 1 to 3, we see no necessity to answer Questions 4 to 7 in the first appeal.

[42] For the reasons given, we therefore allowed this appeal with costs here and below. The orders of the Court of Appeal are set-aside. The High Court orders are hereby reinstated. Deposit to be refunded to UEM.

THE SECOND APPEAL

[43] As stated earlier, the second appeal was directed against the consequential orders of the Court of Appeal. The Court of Appeal in a separate judgment dated 7 November 2009 stated:

> 6. That brings us to the issue of what consequential orders, if any, we should make in this case. The effect of the principal judgment of this court is that the parties are restored to the respective positions in which they stood before the presentation of

their respective petitions. The result is a deadlock producing an obvious injustice to the parties. For it is clear from the evidence adduced that neither side wants to have anything to do with the other. It is axiomatic that an order of this or indeed any other court should produce complete justice. This principle is embodied in s 69(4) of the Courts of Judicature Act 1964 which provides as follows:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

7. The subsection has been judicially considered in a number of cases including *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 where the Federal Court approved the approach of this court in *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489. In the latter case, this court adopted the following passage from the judgment of Ramaswami J in *Ganesh Ram v Baikunthesh Prasad Singh & Ors* AIR 1951 Pat 291 (at p 293) explaining the scope of O 41 r 33 of the Indian Civil Procedure Code from which s 69(4) is drawn:

> The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. Having regard to the wide language of the rule, it is not expedient to lay down any hard and fast rule regarding its true scope. Involving as it does an exercise of judicial discretion, the question whether the court should exercise the powers in a particular case would no doubt depend upon the special facts and circumstances of the case. It may be conceded that the discretion is not to be exercised in an arbitrary manner nor in such a way as to abrogate the other provisions of the Code with respect to the institution of appeals and cross-objections and the like. But there is ample authority for the view that the power contained in r. 33 extends to those cases where as a result of the appellate court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience (see, for instance, *Jawahar Banu v Shujaat Hussain Beg AIR* [1921] All 367 and *Gangadhar v Banabashi AIR* [1914] Cal 722.

[44] We are of the view that the above decision of the Court of Appeal in wanting to do 'complete justice' was in fact doing the opposite. It has done a complete injustice to UEM. The consequential orders were such that they were not sought for and yet astonishingly granted. The total effect of the orders was tantamount to unjust enrichment. This is because the Court of Appeal in giving effect to the buy-out order and by adopting the valuation of the valuer which valued UEG at approximately RM81m, had failed to consider Seow's own evidence, which the Court of Appeal indirectly held to be credible. Seow had said in his evidence that:

(a) UEG has no money left. It has no cash balance left in its bank account;

(b) UEG has no money to pay its creditors;

(c) UEG has no money to pay salaries;

(d) UEG has no money to pay any bills like electricity and utilities;

(e) UEG has no projects work left to do; and

(f) UEG's employees at its height, in 1999 numbered 130 employees, but at the time of trial only six employees remain.

[45] Obviously, a buy-out of UEG's shares is not a viable option. UEG as rightly found by the trial judge was insolvent. Nevertheless, since we are setting aside the orders of the Court of Appeal on the first appeal and that the orders of the High Court had been reinstated, the consequential orders of the Court of Appeal is no longer a living issue. Thus, we find no necessity to answer the questions posed in the second appeal. Accordingly, we allow second appeal with costs here and below. The orders of the Court of Appeal on the second appeal are set-aside. Deposit to be refunded to UEM.

Order accordingly.

Reported by Ashok Kumar